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IN THE

Supreme Court of the United States

No. 964

7 FIFTHS OLD GRAND-DAD WHISKEY, et al. and
W. R. HERNDON, Claimant, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

W. R. HERNDON,
Claimant, *Petitioner*,

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CHARLEY JONES, INC., WICHITA

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of The Supreme Court of the United States.

I

PRAYER

The claimant, petitioner, W. R. Herndon, prays that a writ of certiorari issue to review the judgment entered November 5, 1946 in the United States Circuit Court of Appeals for the Tenth Circuit (R. 17) in the above entitled cause.

II

JURISDICTION

The jurisdiction of this Honorable Court is invoked under section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925 (28 USCA 347), to review the judgment (R. 17) of the United States Circuit Court of Appeals, Tenth Circuit, entered November 5, 1946, in favor of respondent here (appellee below), the mandate being stayed (R. 21) on petitioner's motion for a period of thirty days from December 9, 1946, and further extended to February 1, 1947.

III

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) The United States Circuit Court of Appeals, Tenth Circuit, has decided an important question of Federal law, which has not been but should be settled by this Honorable Court.

(2) The United States Circuit Court of Appeals, Tenth Circuit, has disposed of the instant matter in a manner probably in conflict with applicable decisions of this Honorable Court.

(3) The United States Circuit Court of Appeals, Tenth Circuit, has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by the trial Court, as to call for an exercise of the power of supervision by this Honorable Court.

(4) We believe that this Court has and should exercise jurisdiction to review the judgment in question

because of the very great importance of the decision and issues involved.

IV

SUMMARY STATEMENT OF THE MATTER INVOLVED

Primarily this case involves approximately 458 gallons of intoxicating liquor. But the issues are incomparably more far-reaching and important.

This case was submitted on an agreed statement of facts (R. 8). According to the agreed statement of facts, the liquor may have changed hands several times in Kansas before it was purchased by claimant from unknown parties. So far as the claimant was concerned, the transaction was purely a local one, the purchase and possession of intoxicating liquor in Kansas. The liquor was at one time in interstate commerce, but interstate commerce had ceased prior to the time the liquor was seized.

This action was commenced in the District Court of the United States for the District of Kansas, Second Division. From a judgment granting the relief prayed for, an appeal was taken to the United States Circuit Court of Appeals, Tenth Circuit. On November 5, 1946, a judgment was entered (R. 17) by said Court affirming the judgment of the District Court. Issuance of the mandate has been stayed by order of said Circuit Court. The liquor is held by respondent pending final disposition of this proceeding.

Under an agreed statement of facts (R. 8), this litigation calls for a judicial interpretation by this Honorable Court of Title 27 USCA 223.

> "Transporting into state where sale prohibited; penalty; state definition of intoxicating liquor adopted "(a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by laws of such State; or (2) if all importation, bringing, or transportation of intoxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than one year, or both."

and Title 27 USCA 224:

> "Seizure and forfeiture
>
> "All intoxicating liquor involved in any violation of this chapter and sections 388-390 of Title 18, the containers of such intoxicating liquor, and every vehicle or vessel used in the transportation thereof, shall be seized and forfeited."

The liquor in question was distilled and bottled in states other than the State of Kansas, and was brought from those states into the State of Kansas subsequent to the 1st day of January, 1944, by unknown parties. Petitioner, W. R. Herndon, purchased the liquor in Sedgwick County, Kansas prior to the 9th day of November, 1945, from parties unknown to him, according to the agreed statement of facts (R. 8).

On December 13, 1945, libel of information (R. 3) was filed in the United States District Court, for the District of Kansas, for the purpose of forfeiting claimant, petitioner's liquor under the provisions of the Liquor Enforcement Act of 1936 (27 USCA 224). Warrant of arrest was issued in this action, and, under and by virtue of said warrant of arrest, United States Marshal for the District of Kansas took possession of said liquor, and the same is now in his care, custody and control, stored in the vault of the Federal Building at Wichita, Kansas. Petitioner purchased a USRL Dealer's Stamp Tax, No. 316088 (R. 7), which stamp was in his possession and was publicly posted on the premises at the time of the seizure.

Petitioner, claimant, was not arrested at the time of said seizure and has not been arrested since. No complaint has since been filed against him and the filing of a complaint for violation of federal statutes against petitioner, claimant, is not contemplated by federal authorities. (R. 10).

V

QUESTIONS PRESENTED.

(1) The only constitutional basis for 27 USCA, Sec. 224, is found in the power of Congress to regulate interstate commerce, and the statute should not be construed to apply to seizures after interstate commerce has ceased.

(2) The claimant was not engaged in interstate commerce and the intoxicating liquor found in his possession was not in interstate commerce at the time it was seized by Federal agents.

(3) The application of the foregoing principles cannot properly be avoided on the theory that forfeiture occurred prior to seizure.

(4) The foregoing contentions were sufficiently raised in the Circuit Court of Appeals to be considered by the Supreme Court on petition for writ of certiorari.

BRIEF AND ARGUMENT

This brief and argument is in support of the view that 27 USCA Section 224 should be construed to apply only to cases where intoxicating liquor, containers or vehicles are seized while they are still a part of interstate commerce, and should not be construed to apply to the case at bar.

I.

The only constitutional basis for 27 U.S.CA., Sec. 224, is found in the power of Congress to regulate interstate commerce, and the statute should not be construed to apply to seizures after interstate commerce has ceased.

The Federal Government has only such power as is delegated to it by the Constitution, all other powers being reserved to the states by the Tenth Amendment. Any seizure of property by the Federal Government in excess of its constitutional power violates the Tenth Amendment and the due process clause of the Fifth Amendment.

The only constitutional basis for 27 U.S.C.A., Sec. 224, is found in the power of Congress to regulate interstate commerce. That section is part of the so-called Liquor Enforcement Act of 1936, which makes it an offense to "import, bring, or transport any intoxicating liquor into any state," in which sales of such liquor are

prohibited. As the Circuit Court of Appeals pointed out, "This action was not instituted under a revenue statute." The seizure and forfeiture in this case cannot be sustained as an exercise of the taxing power, since all Federal taxes have been paid, but can only be sustained as an exercise of the power to regulate interstate commerce.

Sec. 2 of the Twenty-First Amendment, which prohibits the transportation or importation into any state of intoxicating liquor in violation of the laws of that state, was designed to restrict rather than enlarge the power of Congress over interstate commerce. The effect of that section was to give the states permission to prohibit or regulate the importation of intoxicating liquors where such prohibition or regulation would otherwise be a violation of the commerce clause or any constitutional limitation on the states. *State Board of Equalization v. Young,* 229 U. S. 59; 81 L. ed. 38; *Indianapolis Brewing Company v. Liquor Control Commission,* 305 U. S. 391; 83 L. ed. 243.

27 U. S. C. A., Sec. 224, was applied in *Hayes v. U. S.,* 112 Fed. (2d) 417, so as to require the forfeiture of intoxicating liquor which was being transported from Arkansas to Oklahoma and the automobile being used to transport it. In that case, however, the liquor and automobile were seized at the time the person who was transporting them in interstate commerce was arrested. Sustaining the forfeiture as against various contentions, the court said:

> "It is urged that the Liquor Enforcement Act of 1936 is unconstitutional in that it undertakes to impose penalties for violation of state law contrary

to the Tenth Amendment. Counsel rely on U. S. v. Constantine, 296 U. S. 287, 80 L. ed. 233. The penalty imposed is not for violation of state law but for violation of the Liquor Enforcement Act of 1936. While the Twenty-First Amendment surrendered to each state the power to prohibit or condition the importation of intoxicating liquor in interstate commerce thereinto, we do not regard it as a surrender of the power of Congress to prohibit or regulate the transportation of intoxicating liquor in interstate commerce. The language of the Twenty-First Amendment is prohibitory in character. We entertain no doubt that the Congress has the power to enact legislation to execute the amendment and penalize its violation. The Constantine case involved an act which was essentially internal in character. The act here involved was interstate in character and constituted a transportation in interstate commerce. We think the Constantine case is clearly distinguishable."

We believe that the contention made in the Hayes case was properly overruled by the Circuit Court of Appeals in that case, because the liquor and automobile were seized while they were still a part of interstate commerce, but by the same token we believe a similar contention should be sustained, where, as in the present case, interstate commerce has ceased at the time of seizure.

Our contention is that to apply 27 U. S. C. A., Sec. 224, after interstate commerce has ceased, would violate the principles set forth in *U. S. v. Constantine,* 296 U. S. 287, 80 L. ed. 233, where the imposition of a special Federal excise tax on persons dealing in intoxicating liquor in violation of state law was held to be "a penalty for the violation of state law, and as such beyond the limits of Federal power." The Supreme Court said:

"The statute is clear invasion of the police power inherent in the states, reserved from the grant of powers to the Federal Government by the Constitution. We think the suggestion has never been made—certainly never entertained by this court—that the United States may impose cumulative penalties above and beyond those specified by state law for infractions of the state's own criminal code by its own citizens. The affirmation of such a proposition would obliterate the distinction between the delegated powers of the Federal Government and those reserved to the states and their citizens. The implications from a decision sustaining such an imposition would be startling. The concession of such a power would open the door to unlimited regulation of matters of state concern by federal authority. The regulation of the conduct of its own citizens belongs to the states, not to the United States. The right to impose sanctions for violations of the state's laws inheres in the body of its citizens, speaking through their representatives. So far as the restrictions of the Tenth Amendment were qualified by the adoption of the Eighteenth, the qualification has been abolished."

It is well settled that where one construction of a Federal statute would render it constitutional, and another construction would render it unconstitutional or create doubt as to its constitutionality, the construction will be adopted which will render the statute unconstitutional. *National Labor Relations Board v. Jones & Laughlin Steel Corporation,* 301 U. S. 1; 81 L. ed. 893; *Anniston Manufacturing Company v. Davis,* 301 U. S. 337 ;81 L. ed. 1143; *Chippewa Indians v. U. S.,* 301 U. S. 358; 81 L. ed. 1156; *Ex parte Endo,* 323 U. S. 283; 89 L. ed. 243; *Alabama State Federation of Labor v. McAdory,* 325 U. S. 450; 89 L. ed. 1725.

Under this rule, 27 U. S. C. A., Sec. 224, should not be construed to apply to seizures after interstate commerce has ceased.

II.

The claimant was not engaged in interstate commerce and the intoxicating liquor found in his possession was not in interstate commerce at the time it was seized by Federal agents.

According to the agreed statement of facts, the liquor was brought into Kansas prior to the date of seizure by parties unknown to the claimant. It was purchased by the claimant prior to the date of seizure, in Sedgwick County, Kansas, from parties unknown to him. Although the statement of the case by the Circuit Court of Appeals appears to assume that the parties from whom the claimant purchased the liquor, were the same parties who brought it into Kansas, the agreed facts do not so state. According to the agreed statement of facts, the liquor may have changed hands several times in Kansas before it was purchased by the claimant. So far as the claimant was concerned, the transaction was purely a local one, the purchase and possession of intoxicating liquor in Kansas. According to the agreed statement of facts, the liquor was at one time in interstate commerce but interstate commerce had ceased prior to the time it was seized.

III.

The application of the foregoing principles cannot properly be avoided on the theory that forfeiture occurred prior to seizure.

The Circuit Court of Appeals took the position that "forfeiture occurs at the point and time when the liquor is unlawfully transported across the state line, and title to the liquor passes to the Federal Government at that time."

It is our contention that this position is erroneous, in so far as it is adopted to apply to 27 U. S. C. A., Sec. 224, to seizures after interstate commerce has ceased, for the following reasons:

1. Forfeiture does not occur prior to seizure or condemnation in the absence of a statute requiring that interpretation.

In forfeitures at common law nothing vested in the Government until it took some legal step to assert its right, but by statute the thing forfeited may vest either immediately or on the performance of some particular act at the will of the legislature. *U. S. v. Grundy,* 3 Cranch 337; 2 L. ed. 459.

The Supreme Court took the view in a number of earlier cases involving forfeitures for attempts to defraud the United States of the tax on distilled spirits, under statutes providing that certain property "shall be forfeited"; (see 26 U. S. C. A., Sec. 2833) that "whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not proved until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed, and the condemnation, when obtained, relates back to

that time, and voids all intermediate sales and alienations, even to purchasers in good faith." *U. S. v. Stowell,* 133 U. S. 1; 33 L. ed. 555. See *Henderson's Distilled Spirits,* 14 Wall. 44; 20 L. ed. 815; and *Thacher's Distilled Spirits,* 103 U. S. 679; 26 L. ed. 535.

A similar view was taken under 19 U. S. C. A., Sec 483, providing for the forfeiture of vehicles involved in violations of the tariff laws, in three cases cited by the Circuit Court of Appeals in the present case. *U. S. v. 1 Oldsmobile Sedan,* 23 Fed. Supp. 323; *Re Ford Sedan, 1937 Model,* 26 Fed. Supp. 146; *U. S. v. Pacific Finance Corporation,* 110 Fed. (2d) 732.

In those cases it was held that automobiles not then being used to transport articles which had been smuggled into the United States but which had previously been used for the transportation of such articles, could be seized and forfeited, the courts sustaining the Government's contention that forfeiture was automatic and title passed to the United States at the time of the offense, regardless of the time of actual seizure. This view was reached, at least in part, because Sec. 483 had been amended in 1935 so as to eliminate the phrase "every such vehicle" which had previously been construed to apply only to vehicles being seized under another section.

These cases are believed distinguishable from the present one in the respects hereinafter mentioned.

2. 27 U. S. C. A., Sec. 224, is a penal statute and, not being a revenue statute, should be strictly construed.

The rule is well settled that penal statutes are to be strictly construed. "Forfeitures are not favored; they should be enforced only when within both the letter and the spirit of the law." *U. S. v. 1-1936 Model Ford,* 307, U. S. 219; 83 L. ed. 1249.

All of the cases mentioned in which the view was taken that forfeiture occurred prior to seizure were statutes intended to prevent frauds upon the revenue; and in U. S. v. Stowell, supra, the Supreme Court pointed out that "Statutes to prevent frauds upon the public revenue" are, "although they impose penalties and forfeitures, not to be construed, like penal laws generally, strictly in favor of the defendant."

27 U. S. C. A., Sec. 224, is not a revenue statute and should, therefore, be strictly construed in favor of the claimant.

3. To construe 27 U. S. C. A., Sec. 224, as providing for forfeiture prior to seizure, would fail to give effect to the express terms of the statute.

The Supreme Court follows the rule that, in interpreting a statute, all words and phrases of the statute are to be taken into account and given effect, if possible. *D. Ginsberg & Sons v. Popkin,* 285 U. S. 204; 76 L. ed. 704; *McDonald v. Thompson,* 305 U. S. 263; 83 L. ed. 164.

The statute involved in U. S. v. Stowell, supra, and the other forfeiture cases decided by the Supreme Court, provided that the property "shall be forfeited," whereas 27 U. S. C. A., Sec. 224, provides that the property "shall be *seized and* forfeited."

Our contention is that this means that the property is to be seized, and forfeited at the time of seizure. To

construe the statute otherwise would be to regard the word "seized" as redundant and to give it no effect whatsoever. If Congress had intended that the property should be forfeited automatically when it was transported across the state line, it would only have been necessary to provide that the property "shall be forfeited," as in the statute involved in the Stowell case, because there could be no question of the right of the Government to seize and condemn that which had been previously forfeited to it. Some meaning must be attributed to Congress in adding the word "seized."

Moreover, if Congress had intended that forfeiture should occur prior to seizure, the statute would more logically have provided that the property should be "forfeited and seized" rather than "seized and forfeited." The fact that the "seized" precedes "forfeited" in the statute is certainly an indication that Congress did not intend forfeiture to occur prior to seizure, as the Government contends.

The different wording of forfeiture statutes has been regarded as requiring different interpretations in this respect. Thus in *The Fredericka Schepp,* 195 Fed. 623, involving forfeiture of a vessel for false registry, the court held that forfeiture dated from the time of seizure and not from the date of the illegal act and distinguished the Stowell case in that there the statute said "shall be forfeited" while the false registry statute said "shall be liable to forfeiture."

It is recognized that 19 U. S. C. A., Sec. 483, involved in the three cases cited by the Court of Appeals in the present case said "shall be seized and forfeited" as does 27 U. S. C. A., Sec. 224, but the point being made here

does not appear to be raised in those cases. Moreover, the present case is distinguishable from those cases in the other respects mentioned.

4. To construe 27 U. S. C. A., Sec. 224, as providing for forfeiture prior to seizure would, as applied to seizures after interstate commerce has ceased, render the statute unconstitutional.

The constitutional limits on the power of the Federal Government have previously been discussed under I, supra, where it was pointed out that the courts favor a construction of a statute which will render it constitutional over one which would render it unconstitutional or create doubt as to its constitutionality.

The claimant's position is no different from that of every other individual in a dry state, who is in possession of intoxicating liquor which has been imported from outside the state. Under the contention made by the Government and adopted by the Circuit Court of Appeals in this case, that forfeiture occurs and title passes to the United States at the time intoxicating liquor is transported across the state line, practically all of the liquor in the homes and refrigerators of private individuals in dry states belongs to the Federal Government and may be seized and condemned by it at any time. If it was the duty of the Federal agents to seize the claimant's liquor in this case, it is also their duty to seize all liquor imported from outside the state and now in the possession of any persons in Kansas and other dry states. In other words, it is their duty to enforce the prohibitory laws of those states.

It is submitted that the power of the Federal Government does not extend this far, and that Congress did

not intend that 27 U. S. C. A., Sec. 224, should be so construed. Yet this is the necessary consequence of the construction contended for by the Government.

In fact, it must be conceded that in any case the forfeiture is not absolute prior to seizure. At most, the seizure and condemnation "relate back" to the time of the original offense. It was incorrect for the Circuit Court of Appeals to say that "title passes" to the Government at that time.

Even under the statute involved in U. S. v. Stowell, supra, and other cases providing for forfeitures for attempting to defraud the United States of tax, the Supreme Court has more recently held that no title vests in the Government prior to a judgment of forfeiture. *Motolow v. Missouri,* 295 U. S. 97; 79 L. ed. 1327, where land was seized for violations of the law in removing distilled spirits without payment of the Federal tax and a judgment of forfeiture was subsequently rendered which provided in the alternative for release of the property upon the giving of a bond for payment of a sum of money if the forfeiture were affirmed on appeal.

Such a bond was given and the land was released from all claims of the United States. Rejecting the contention that title vested in the United States at the time of the offense so that the land was not subject to a lien for state taxes between that time and the judgment of forfeiture, the Court said:

> "While, under the statute in question, a judgment of forfeiture relates back to the date of the offense as proved, that result follows only from an effective judgment of condemnation. . . . In this instance there was no such judgment and hence title

did not vest in the United States. As the title of the owner was not divested, the land remained subject to the claim for local taxes."

If Congress had no power to provide for seizure of the liquor directly after it ceased to be a part of interstate commerce, the same result could not be accomplished indirectly by any theory that the seizure "related back," and it is our contention that Congress did not intend to do so.

All of the other forfeiture cases referred to involved the exercise of the Federal taxing power, whereas this case involves the exercise of the Federal power over interstate commerce. It may be that property once subject to the taxing power is always subject to that power. It is certainly not the law that "Once property is in interstate commerce, it is always in interstate commerce." This is virtually the contention of the Government in trying to apply 27 U. S. C. A., Sec. 224, to the present case. To argue any such doctrine would overrule the many cases in which the Supreme Court has specifically passed on the question whether interstate commerce had ceased.

IV.

The foregoing contentions were sufficiently raised in the Circuit Court of Appeals to be considered by the Supreme Court on petition for writ of certiorari.

Under point III of the Appellant's brief before the Circuit Court of Appeals, it was argued that the claimant had "lost his property rights without due process of law" and that he "could not be charged with being engaged in interstate commerce."

The final paragraph of the opinion of the Circuit Court of Appeals adopts the theory that forfeiture occurred at the time the liquor was transported across the state line to overcome this argument.

It is true that, in cases coming from the lower Federal Courts, a constitutional question can be raised for the first time in the Supreme Court only in exceptional cases. *Wong Tai v. U. S.,* 273 U. S. 77; 71 L. ed. 545; *Duigman v. U. S.,* 274 U. S. 195; 71 L. ed. 996. But in *Dewey v. Des Moines,* 173 U. S. 193; 43 L. ed. 665, the Court said that "If the question were only an enlargement of the one" mentioned below, or "If it were so connected with it in substance as to form but another ground or reason" for the point mentioned below, it could be considered by the Supreme Court; that while they could not raise an unrelated question, the "parties are not confined here to the same arguments which were advanced in the courts below on a Federal question under discussion." See also *Muncie Gear Works v. Outboard, Marine & Manufacturing Company,* 315 U. S. 759; 86 L. ed. 1171; and *Marconi Wireless Telegraph Company v. U. S.,* 320 U. S. 1; 87 L. ed. 731.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Tenth Circuit, commanding that Court to certify and send to this Honorable Court for its review and determination, on a day certain to be therein stated, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 3371, 7 FIFTHS OLD GRAND-DAD WHISKEY, ET AL., AND W. R. HERNDON, CLAIMANTS, APPELLANTS, vs.

UNITED STATES OF AMERICA, APPELLEE, and that the judgment of said United States Circuit Court of Appeals, Tenth Circuit, be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will every pray.

W. R. HERNDON,
Claimant, Petitioner
By: HAL M. BLACK,
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January, 1947.